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# ECOLABEL PROGRAMS AND GREEN CONSUMERISM: PRESERVING A HYBRID APPROACH TO ENVIRONMENTAL REGULATION

## INTRODUCTION

Since environmental law emerged as a method for regulating industry pollution, command and control technology-based standards have been the dominant government strategy and the dominant recipients of academic criticism.<sup>1</sup> To alleviate the inefficiencies of technology-based standards, critics advocated for changing the method used to set standards,<sup>2</sup> as well as for complete alternatives such as market-based and information-based design schemes.<sup>3</sup> Others believed that “the use of multiple instruments will tend to be the rule rather than the exception” for setting broad environmental laws.<sup>4</sup> Modern government environmental programs often intertwine regulatory standards with ecolabel programs,<sup>5</sup> but whether such intervention has eradicated the problems of technology-based standards is questionable.<sup>6</sup>

Ecolabel programs substantiated by third-party certification exemplify a hybrid form of environmental law, using standards, incentives, and

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1. See, e.g., Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333, 1335 (1985) [hereinafter Ackerman & Stewart]; Rena I. Steinzor, *Reinventing Environmental Regulation: The Dangerous Journey from Command to Self-Control*, 22 HARV. ENVTL. L. REV. 103, 112 (1998); Wendy E. Wagner, *The Triumph of Technology-Based Standards*, 2000 U. ILL. L. REV. 83, 84–85 (2000). Command and control regulations “require or proscribe specific conduct by regulated firms.” Richard B. Stewart, *Regulation, Innovation, and Administrative Law: A Conceptual Framework*, 69 CAL. L. REV. 1256, 1264 (1981) [hereinafter Stewart, *Conceptual Framework*].

2. Richard B. Stewart, *A New Generation of Environmental Regulation?*, 29 CAP. U. L. REV. 21, 38–40 (2001) [hereinafter Stewart, *New Generation*].

3. *Id.* at 94–99, 127–29.

4. Robert W. Hahn, *The Political Economy of Environmental Regulation: Towards a Unifying Framework*, 65 PUB. CHOICE 21, 36 (Apr. 1990). See also Jamie A. Grodsky, *Certified Green: The Law and Future of Environmental Labeling*, 10 YALE J. ON REG. 147, 150 n.5 (1993) (“Incentive-based, market-driven means of accomplishing environmental goals can serve as valuable supplements to traditional command-and-control regulatory programs.”).

5. See, e.g., U.S. GREEN BLDG. COUNCIL, LEED INITIATIVES BY STATE (2010) [hereinafter LEED INITIATIVES BY STATE], available at <https://www.usgbc.org/ShowFile.aspx?DocumentID=7924> (Leadership in Energy and Environmental Design (LEED) certification for buildings implemented by federal, state, and local governments); AGRIC. MKTG. SERV., USDA, NATIONAL ORGANIC PROGRAM BACKGROUND INFORMATION (2008) [hereinafter NATIONAL ORGANIC PROGRAM BACKGROUND INFORMATION], available at <http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELDEV3004443> (the U.S. Department of Agriculture (USDA) Organic food labeling program); ENERGY STAR, THE ENERGY STAR® LABEL: A SUMMARY OF PRODUCT LABELING OBJECTIVES AND GUIDING PRINCIPLES2 (2003), available at [http://www.energystar.gov/ia/partners/prod\\_development/downloads/guiding\\_princip.pdf](http://www.energystar.gov/ia/partners/prod_development/downloads/guiding_princip.pdf). (ENERGY STAR appliance labeling program).

6. For example, the U.S. Department of Agriculture Organic program suffers from inadequate enforcement. OFFICE OF INSPECTOR GEN., USDA, AUDIT REPORT 01601-03-HY 1, 1–4, OVERSIGHT OF THE NATIONAL ORGANIC PROGRAM (Mar. 2010).

information to implement change.<sup>7</sup> An ecolabel is “[a] visual communication tool indicating environmentally preferable products, services or companies that are based on standards or criteria.”<sup>8</sup> Ecolabel regulations, as a form of information-based government intervention, work best “when the label’s meaning is well understood by consumers and reflects their preferences.”<sup>9</sup> When the ecolabel program is implemented prematurely, ahead of the consumer learning curve, such initiative to inform consumers about a product’s environmental benefits with a simple label results in insufficient disclosure of a product’s environmental attributes.<sup>10</sup> Paradoxically, the shorthand endorsement of attributes precludes the consumer from making informed choices.<sup>11</sup> Additionally, unsubstantiated and unverified environmental claims could lead to consumer deception and mistrust of the ecolabel.<sup>12</sup>

As consumers have become more interested in purchasing sustainable products, academics, politicians, and even industries have stressed a need to mitigate issues of consumer confusion and mistrust and have advocated for government regulation and uniformity of ecolabel programs, standards, and environmental claims.<sup>13</sup> Meanwhile, government agencies have taken an active role in implementing and incentivizing ecolabel programs that require third-party certification, or compliance with such certification,<sup>14</sup> so that the consumer has “assurance that a product, process or service

7. See, e.g., Stewart, *New Generation*, *supra* note 2, at 97, 136.

8. *Greener Products Glossary*, EPA, <http://www.epa.gov/greenerproducts/glossary/index.html> (last updated Feb. 28, 2012).

9. David Conner & Ralph Christy, *The Organic Label: How to Reconcile its Meaning with Consumer Preferences*, 35 J. FOOD DISTRIB. RES. 40, 40 (2004).

10. Stewart, *New Generation*, *supra* note 2, at 139. “One of the primary limitations in environmental labeling programs . . . has been a lack of consumer awareness or interest in eco-labels and the information they seek to provide.” *Id.*

11. See Peter S. Menell, *Structuring a Market-Oriented Federal Eco-Information Policy*, 54 MD. L. REV. 1435, 1436 (1995).

12. Roger D. Wynne, *The Emperor’s New Eco-Logos?: A Critical Review of the Scientific Certification Systems Environmental Report Card and the Green Seal Certification Mark Program*, 14 VA. ENVTL. L.J. 51, 54 (1994) (describing the current “green consumer market” as “dysfunctional” because of unsubstantiated claims, deceptive fact-skewing, and resulting consumer cynicism).

13. See, e.g., Menell, *supra* note 11, at 1462–63 (advocating for a market-oriented approach due to the inadequacy of eco-information alone). The eco-information program could be reformed with the federal government acting as the central authority and the state and local governments implementing the regulations. Menell, *supra* note 11, at 1463, 1470, 1472. See also Lauren C. Avallone, Comment, *Green Marketing: The Urgent Need for Federal Regulation*, 14 PENN ST. ENVTL. L. REV. 685 (2006); Jessica E. Fliegelman, Note, *The Next Generation of Greenwash: Diminishing Consumer Confusion Through a National Eco-Labeling Program*, 37 FORDHAM URB. L.J. 1001 (2010); Greg Northen, Comment, *Greenwashing the Organic Label: Abusive Green Marketing in an Increasingly Eco-Friendly Marketplace*, 7 J. FOOD L. & POL’Y 101 (2011); Robert B. White, Note, *Preemption in Green Marketing: The Case for Uniform Federal Marketing Definitions*, 85 IND. L.J. 325 (2010).

14. See, e.g., Avi Gesser, Comment, *Canada’s Environmental Choice Program: A Model for a “Trade-friendly” Eco-Labeling Scheme*, 39 HARV. INT’L L.J. 501, 501 (1998).

conforms to specified requirements.”<sup>15</sup> However, this movement for uniformity could threaten the hybrid balance of the ecolabel form of environmental regulation, resulting in a return to, rather than an evolution from, the themes of traditional command and control regulation so vehemently opposed today.

This note will present three examples of well-developed organizations that have implemented third-party certification ecolabel programs that have received widespread acceptance within their industry. They exemplify how government-administered or government-encouraged ecolabel programs have limits to their effectiveness. Consumer misconceptions about what these ecolabel programs actually represent persist, and the programs do not necessarily encourage anything more than a discrete traditional standard. These approaches dampen the effectiveness of a hybrid form of environmental regulation, and have resulted in ecolabel programs with third-party certification suffering from many of the same problems of command and control technology-based standards.

Part I provides an overview of technology-based standard setting and its shortcomings as an environmental regulation, and compares it with market-based alternatives. Part II explains the background of the environmental consumerism movement. As consumers demanded eco-friendly products and the industry responded by producing products claiming to be eco-friendly, various stakeholders—including non-governmental organizations, federal agencies, and state governments—contemplated methods for protecting consumers from unsubstantiated environmental claims. Part III evaluates three mainstream ecolabel programs in the United States: United States Department of Agriculture (USDA) Organic for agricultural products, ENERGY STAR for appliances, and Leadership in Energy & Environmental Design (LEED) for buildings. After an overview of the program, each ecolabel will be evaluated based on how consumers comprehend the ecolabel and whether the ecolabel program suffers from regulatory issues rooted in traditional command and control environmental theory. Finally, Part IV concludes by advocating for hybrid regulatory controls as effective strategies in promoting consumer comprehension.

## **I. THEORIES OF ENVIRONMENTAL REGULATION: FROM COMMAND AND CONTROL TO MARKET-BASED SOLUTIONS**

In the 1960s and 1970s, the federal government enacted a series of environmental regulations targeting pollution.<sup>16</sup> As a result, “every discharge into the land, water or air . . . requires direct or indirect

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15. *Greener Products Glossary*, *supra* note 8.

16. E. Donald Elliott et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313, 317 (1985).

permission from the national government.”<sup>17</sup> The federal government has preferred to use standards as opposed to screening because it capitalizes on economies of scale, maintains the control of a centralized decision-making authority (as opposed to delegating to state and local governments), and “avoid[s] competitive or regional disruption.”<sup>18</sup> Environmental economists generally focus on correcting externalities at the manufacture or development level, so that product prices accurately represent environmental harm.<sup>19</sup>

Criticism of these environmental tools led academics to consider the next evolution in environmental regulation.<sup>20</sup> They argued that environmental law should shift to a system that involved the public in answering whether current regulations are too ambitious, too lax, or just right,<sup>21</sup> and implement a strategy focused at the consumer level to improve environmental quality sufficiently.<sup>22</sup> Ecolabel programs have emerged as a solution because they assist consumers in directly addressing environmental externalities and in making informed purchases.<sup>23</sup> And though environmentalists tend to prefer the current standards-based approach while industries usually want market-based environmental controls,<sup>24</sup> ecolabel programs combine the advantages of both regulatory tools.<sup>25</sup>

#### **A. THE SHORTCOMINGS OF COMMAND AND CONTROL ENVIRONMENTAL REGULATION THROUGH TECHNOLOGY- BASED STANDARD SETTING**

As command and control regulations mandate certain actions,<sup>26</sup> the government may implement the system through “standards” or “screening” techniques.<sup>27</sup> Standards are requirements “uniformly applied to an entire category of products or processes,” whereas screening makes individual,

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17. *Id.* Water and air pollution are regulated by technology standards based on best available technology. Ackerman & Stewart, *supra* note 1, at 1334–35. *See also* Wagner, *supra* note 1, at 85 n.7.

18. Stewart, *Conceptual Framework*, *supra* note 1, at 1266. For products, uniformity helps industries and enforcers benefit from economies of scale. Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 618 (1996). Uniformity of process is desirable when “network effects are significant,” meaning that a jurisdiction benefits by adopting a previously developed policy design, even if not perfectly tailored to the jurisdiction, to avoid substantial costs of developing one itself. *Id.* at 619 (internal quotation marks omitted). Industries supported national rules because they were viewed as a lesser evil than having to deal with infinite state and local government strategies. Elliott et al., *supra* note 16, at 333.

19. Stewart, *New Generation*, *supra* note 2, at 94.

20. Ackerman & Stewart, *supra* note 1, at 1334.

21. *Id.* at 1353.

22. *See* JAMES GUSTAVE SPETH, *THE BRIDGE AT THE EDGE OF THE WORLD* 147–48 (2008).

23. Menell, *supra* note 11, at 1444.

24. Hahn, *supra* note 4, at 30.

25. Gesser, *supra* note 14, at 504, 512.

26. *See generally* Stewart, *Conceptual Framework*, *supra* note 1.

27. *Id.* at 1265.

case-by-case, decisions.<sup>28</sup> Technology-based standards, also known as design standards, are set after the government assesses industry practices, the current equipment available to control pollution, and the realistic effectiveness of such equipment.<sup>29</sup> By taking inventory of what methods are possible, the government then sets pollution limits for industry classes that correlate to the individual businesses using such technology.<sup>30</sup>

The main advantages of technology-based standards are consistent and predictable results, reduced implementation costs, and transparent decision making.<sup>31</sup> Because of the uncertainty in human-caused environmental impact, technology standards remain “one of the most reliable methods for controlling pollution.”<sup>32</sup> A central regulation scheme, as compared to individual decision making, enables “broad-based scientific activities” and “collectively derived best approximations about environmental harms.”<sup>33</sup> There is no need to prove the harm associated with the pollution, reducing the burden of establishing causation.<sup>34</sup> Standards also address pollution with technology solutions rather than “switching to inherently less polluting [sources].”<sup>35</sup> With standards, environmental protection is of paramount importance in setting regulations.<sup>36</sup>

Despite the numerous advantages, technology-based standards have borne the brunt of command and control environmental regulation criticism,<sup>37</sup> particularly for economic inefficiency and agency failure.<sup>38</sup> The requirements apply uniformly to a specific group, even though the ecological conditions, human effects, and opportunity costs may vary widely within each class or category.<sup>39</sup> “[D]iffering control capabilities and cost functions of particular polluters” are of no concern.<sup>40</sup> Additionally, new

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28. *Id.* See also Howard Latin, *Ideal Versus Real Regulatory Efficiency: Implementation of Uniform Standards and Fine-Tuning Regulatory Reforms*, 37 STAN. L. REV. 1267, 1269 n.8 (1985) (noting standards are set by “different categories or classes of industries”).

29. See Wagner, *supra* note 1, at 88–89. Other standards are based on harm levels, costs and benefits, and performance. *Id.* at 87 n.14.

30. *Id.* at 88–89. Technology-based standards almost always set a numerical limit but often are misconstrued as always requiring a specific technology to actually be implemented. *Id.* at 90 n.26.

31. Latin, *supra* note 28, at 1271. Even if the program is expensive, it is still economically feasible. *Id.* at 1273.

32. Wagner, *supra* note 1.

33. Esty, *supra* note 18, at 578–80.

34. Latin, *supra* note 28, at 1303.

35. Elliott et al., *supra* note 16, at 333.

36. Latin, *supra* note 28, at 1268 n.6.

37. Steinzor, *supra* note 1, at 114. Health-based standards are preferable to technology-based standards, but obtaining the information necessary to set correct pollution levels to correlate with health effects is extremely difficult. *Id.* at 113–14.

38. *Id.* at 112.

39. Latin, *supra* note 28, at 1268 n.7.

40. *Id.* at 1269 n.8. See also Ackerman & Stewart, *supra* note 1, at 1335 (stating that uniform technology standards are wasteful because they do not assess individual costs or individual pollution effects).

sources are regulated more stringently than existing sources.<sup>41</sup> This potentially discourages new players from entering the market.<sup>42</sup>

Regulations can “foreclose innovation opportunities.”<sup>43</sup> The agency’s snapshot assessment of available technology fails to encourage continuous innovation of environmental technology.<sup>44</sup> An industry has no incentive to do any better than what the standard requires.<sup>45</sup> Also, a “moving target” phenomenon occurs, whereby “uncertain, shifting targets . . . can chill innovation incentives among regulated firms”<sup>46</sup> because industries have difficulty in predicting the standards about to be imposed upon them.<sup>47</sup>

Within a single agency, setting standards may be separated from monitoring and enforcing responsibilities, and could hinder an effective bargaining process that fully considers intra-agency tradeoffs.<sup>48</sup> The government has limited resources, is unable to fund effective monitoring, and must rely on industry self-reporting.<sup>49</sup> Even when illegal acts are discovered, the sanctions imposed are ineffective deterrents.<sup>50</sup> In summary, many critics feel that “technology-based standards have not met their potential.”<sup>51</sup>

## **B. MARKET-BASED ALTERNATIVES TO ENVIRONMENTAL REGULATION**

Through economic incentive programs, the government tries to establish its environmental goals by using economic instruments to set the correct price of a unit of environmental degradation,<sup>52</sup> in contrast to command and control programs that attempt to set the correct quantity of total environmental degradation.<sup>53</sup> Industries remain free to set their own internal quantity but are incentivized to lower their quantities of harm and to develop the most cost-effective means for complying with such limits.<sup>54</sup>

A related field of environmental theory is “reflexive law,”<sup>55</sup> which can supplement or work in conjunction with the existing regulatory schemes.<sup>56</sup>

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41. See, e.g., Hahn, *supra* note 4, at 27; Ackerman & Stewart, *supra* note 1, at 1336.

42. See Ackerman & Stewart, *supra* note 1, at 1336.

43. Stewart, *Conceptual Framework*, *supra* note 1, at 1262. “Market innovation” relates to increasing market output per unit of input. *Id.* at 1261. “Social innovation” relates to developing new methods that promote public welfare. *Id.*

44. Ackerman & Stewart, *supra* note 1, at 1336.

45. Latin, *supra* note 28, at 1269 n.9.

46. Stewart, *Conceptual Framework*, *supra* note 1, at 1272.

47. *Id.* at 1271.

48. Hahn, *supra* note 4, at 39.

49. Ackerman & Stewart, *supra* note 1, at 1344–45.

50. *Id.*

51. See Wagner, *supra* note 1, at 110–12 (viewing, optimistically, technology-based standards as having room for improvement).

52. Stewart, *New Generation*, *supra* note 2, at 96.

53. *Id.* at 94.

54. *Id.* at 95.

55. *Id.* at 127.

The objective of reflexive law is to “promote the internalization of environmental norms . . . as opposed to directly controlling . . . external conduct.”<sup>57</sup> Like economic incentives, reflexive law continues to focus on industry conduct, not consumer conduct.<sup>58</sup>

Problems with such programs include the ability to provide accurate data in a clear way to consumers, ability to obtain market data as to whether consumers will actually pay a premium, and reluctance to aggregate such consumer preferences to set national environmental goals.<sup>59</sup> Thus, these programs have been described as “unsuitable candidates” for replacing command and control programs entirely, though could be “useful supplements” in the broad environmental regulatory scheme.<sup>60</sup>

### **C. A HYBRID APPROACH: ECOLABEL STRATEGIES FOR CORRECTING ENVIRONMENTAL EXTERNALITIES AND EMPOWERING CONSUMERS TO EXPRESS THEIR PURCHASE PREFERENCES**

In the United States, a main culprit of environmental harm is consumer behavior.<sup>61</sup> Another market-driven method for mitigating environmental damage associated with consumption is through “green consumerism,” where consumers want to buy green products and businesses want to produce them.<sup>62</sup> Green consumerism is one of the few environmental protection strategies that align the interests of environment and industry.<sup>63</sup>

Ecolabel programs are a hybrid form of environmental regulation because they set uniform criteria for an entire class,<sup>64</sup> like technology-based standards, but independent organizations develop their own methods for certifying environmental attributes.<sup>65</sup> As an alternative to command and

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56. *Id.* at 129, 130.

57. *Id.* at 127.

58. *Id.* Ecolabel programs within this category inform consumers about a firm or product’s environmental performance so that the consumer purchases from them instead of from environmentally inferior performing firms or products. *Id.* at 97. The ecolabel indirectly imposes a tax on poorly performing environmental products because the businesses that make such products suffer from diminished sales. *Id.*

59. *Id.*

60. *Id.* at 96–97.

61. See SPETH, *supra* note 22, at 147.

62. See SPETH, *supra* note 22, at 148; Grodsky, *supra* note 4, at 150; see also Ciannat M. Howett, Note, *The “Green Labeling” Phenomenon: Problems and Trends in the Regulation of Environmental Product Claims*, 11 VA. ENVTL. L.J. 401, 403 (1992) (stating that “green” consumerism is a method to “increase the market for environmentally-sound products”).

63. See, e.g., Gesser, *supra* note 14, at 501 (“For producers, these labels are an opportunity to increase sales for certain products that meet the labeling requirements. From the environmentalist’s perspective, the labels help preserve the environment by encouraging consumers to buy, and manufacturers to produce, products that are not harmful to the environment.”). Regarding environmental policy, industries are concerned about profit effects while environmentalists care about environmental effects. See Hahn, *supra* note 4, at 25.

64. Gesser, *supra* note 14, at 5004.

65. See Stewart, *New Generation*, *supra* note 2, at 136–37.



control, industries develop their own regulations, usually with public participation and government oversight.<sup>66</sup> Whereas a market-based system relies on the price to reflect environmental externalities, information-based ecolabels describe environmental attributes about a product.<sup>67</sup> Ecolabel programs and third-party certification let individuals express their willingness to pay for noneconomic benefits as private consumers,<sup>68</sup> in contrast to technology-based rationales that force individuals to pay as public citizens.<sup>69</sup> Informed individuals will also be better equipped to engage in civic action, which is crucial to the success of modern environmental activism.<sup>70</sup>

Ecolabel programs rely on the theory that third-party certification self-regulation will work because “an industry consensus will develop over time regarding the criteria for environmental seals.”<sup>71</sup> Consumers identify the best products without requiring costly government monitoring and enforcement.<sup>72</sup> The success of green consumerism, however, depends on accurate information regarding the environmental attributes of the product.<sup>73</sup>

## II. HISTORY OF GREEN CONSUMERISM AND THE “GREENWASHING” PHENOMENON

As environmental effects of human activity became increasingly publicized, consumers recognized “that their individual and collective purchasing . . . decisions significantly affect the quality of the environment.”<sup>74</sup> A surge of environmentally conscious consumers started to consider environmental effects when comparing products.<sup>75</sup> Indeed, consumers wanted to buy green products and were willing to pay a premium for them.<sup>76</sup> In response, businesses wanted to capitalize on the

66. See Steinzor, *supra* note 1, at 104.

67. See Menell, *supra* note 11, at 1442–43.

68. Stewart, *New Generation*, *supra* note 2, at 141 (discussing how individuals make the decision to act).

69. See generally Sidney A. Shapiro & Thomas O. McGarity, *Not so Paradoxical: The Rationale for Technology-based Regulation*, 1991 DUKE L.J. 729, 741–42 (discussing non-economic benefits of protecting workers and the environment).

70. See SPETH, *supra* note 22, at 221. A “New Democracy” supporting environmental change will rely on “direct democracy—citizens debating the options, learning together, overcoming their differences, and coming to decision. It is far away from today’s interest-group, representational democracy.” *Id.*

71. Fliegelman, *supra* note 13, at 1045.

72. See *id.* at 1046.

73. See SPETH, *supra* note 22, at 150.

74. Howett, *supra* note 62, at 401.

75. See, e.g., Howett, *supra* note 62, at 401–03; Scott Hume & Patricia Strnad, *Consumers Go ‘Green,’* ADVERTISING AGE, Sept. 25, 1989, at 3 (publishing a consumer national survey showing that consumers were concerned enough about environmental effects that they were willing to change their buying habits by sacrificing convenience or paying more).

76. Grodsky, *supra* note 4, at 147, 149.

new interest in sustainable products and claim that they produced green products.<sup>77</sup> Consumer interest in buying green products became “perhaps the most important marketing trend of the [1990s].”<sup>78</sup>

However, manufacturers were unclear in substantiating their products’ environmental claims.<sup>79</sup> Many green marketing terms had “no clear, uniform meaning.”<sup>80</sup> Additionally, a product could advertise one environmental benefit even though there was tradeoff environmental harm.<sup>81</sup> An energy-efficient light bulb could contain toxic chemicals.<sup>82</sup> The American Heart Association’s initiative to label foods that were less bad than comparable foods regarding heart disease with a HeartGuide label caused controversy because unlabeled products in another food category would likely be healthier.<sup>83</sup> The legitimacy of such green product claims varied considerably, which “led to consumer confusion and mistrust of environmental claims in general.”<sup>84</sup>

Because of the consumer mistrust of manufacturer claims forming, the success of green consumerism faced formidable challenges: consumers were less experienced in evaluating the validity of environmental claims themselves,<sup>85</sup> and such frustration over confusing marketing claims could hinder the consumer’s pursuit of eco-friendly products.<sup>86</sup> “Information strategies rely entirely on stakeholders to act upon the information.”<sup>87</sup> Yet, as James Gustave Speth stated in *The Bridge at the Edge of the World*, it would be “foolhardy to count on major [environmental] change from the voluntary consumer choices of individuals.”<sup>88</sup> Some level of government regulation is necessary.<sup>89</sup> In the early 1990s, the idea that green consumerism desperately needed a set of uniform guidelines gained wide support.<sup>90</sup>

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77. See, e.g., Roger D. Wynne, *Defining “Green”: Toward Regulation of Environmental Marketing Claims*, 24 U. MICH. J.L. REFORM 785, 786–87 (1991); Howett, *supra* note 62, at 401–02. For example, 26 percent of all new household items introduced in 1990 claimed to have some sort of environmental benefit. *Id.* at 402.

78. CAL. ATTORNEY GEN., FLA. ATTORNEY GEN., MASS. ATTORNEY GEN., MINN. ATTORNEY GEN., MO. ATTORNEY GEN., N.Y. ATTORNEY GEN., TEX. ATTORNEY GEN., UTAH ATTORNEY GEN., WASH. ATTORNEY GEN. & WIS. ATTORNEY GEN., THE GREEN REPORT: FINDINGS AND PRELIMINARY RECOMMENDATIONS FOR RESPONSIBLE ENVIRONMENTAL ADVERTISING 12 (1990) [hereinafter THE GREEN REPORT].

79. *Id.* at 13.

80. *Id.*

81. Grodsky, *supra* note 4, at 150–51 (stating that “the advertised environmental benefits of products are often undercut by undisclosed environmental harms”).

82. *Id.* at 151.

83. *Id.* at 210 (citations omitted).

84. Howett, *supra* note 62, at 402.

85. See, e.g., Grodsky, *supra* note 4, at 150.

86. THE GREEN REPORT, *supra* note 78, at 19.

87. Stewart, *New Generation*, *supra* note 2, at 136.

88. SPETH, *supra* note 22, at 156.

89. *Id.* at 150.

90. See, e.g., THE GREEN REPORT, *supra* note 78, at 19.

**A. PROTECTING CONSUMERS FROM UNSUBSTANTIATED  
ENVIRONMENTAL PRODUCT CLAIMS WITH MARKETING  
GUIDELINES**

The “greenwashing” phenomenon led federal agencies, state governments, and industry leaders to strategize about how best to regulate environmental product claims and protect green consumerism.<sup>91</sup> In 1990, the U.S. Environmental Protection Agency (EPA), the Federal Trade Commission (FTC), and ten states’ Attorneys General (collectively, the Task Force), came together to discuss the recent influx of environmental marketing claims and develop solutions for ensuring that consumers were protected from deceptive advertisement.<sup>92</sup> The Task Force determined that the federal government was the appropriate source of regulation and “is preferable to industry self-regulation” because of the broad range of product categories and because the federal government is responsible for reducing environmental harm.<sup>93</sup> Recommendations for federal action included creating national environmental marketing terminology and testing protocol.<sup>94</sup>

National uniform guidelines do exist.<sup>95</sup> In 1992, the FTC published a set of guidelines “[t]o help marketers make truthful and substantiated environmental claims.”<sup>96</sup> Its *Green Guides* publication is not enforceable as law, but is a useful resource for private industries and businesses seeking to avoid consumer deception regarding environmental advertisement.<sup>97</sup> Additionally, private firms published marketing guides for consumers and industries.<sup>98</sup> TerraChoice, a “sustainable marketing and consulting” firm,<sup>99</sup> describes the seven types of “Sins” that a manufacturer may employ when advertising the environmental attributes of a product.<sup>100</sup> The sins include

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91. See, e.g., *id.* at 2.

92. *Id.*

93. *Id.* at 20–24.

94. *Id.* at 20–21.

95. The FTC publishes its *Green Guides* to “help marketers avoid making green claims that are ‘unfair or deceptive’ in violation of Section 5(a) of the FTC Act.” *It’s Too Easy Being Green: Defining Fair Green Marketing Principles: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Prot. of the H. Comm. on Energy and Commerce*, 111th Cong. 2–3 (2009) (statement of James Kohm, Assoc. Dir., Enforcement Div., FTC), available at <http://www.ftc.gov/os/2009/06/P954501greenmarketing.pdf>.

96. FTC Guides for the Use of Environmental Marketing Claims, 75 Fed. Reg. 63,552, 63,552 (proposed Oct. 15, 2010) (to be codified at 16 C.F.R. pt. 260).

97. *Federal Trade Commission Proposes Revised “Green Guides,”* FTC (Oct. 6, 2010), <http://www.ftc.gov/opa/2010/10/greenguide.shtm>.

98. E.g., TERRACHOICE GROUP, THE SINS OF GREENWASHING (2010), available at <http://sinsofgreenwashing.org/findings/greenwashing-report-2010/>.

99. *Mission and History*, UL TERRACHOICE, <http://terrachoice.com/about/mission-history/> (last visited Aug. 23, 2012).

100. THE SINS OF GREENWASHING, *supra* note 98, at 10.

“hidden trade-off,” “no proof,” “vagueness,” “irrelevance,” “lesser of two evils,” “fibbing,” and “worshipping false labels.”<sup>101</sup>

The Task Force recognized that national standards and environmental certification programs shared the same goal of improving consumer information.<sup>102</sup> Because of the need for distinct uniform guidelines, the Task Force advised that certification and seal of approval programs were well-suited to coexist, rather than merge, with a federal regulatory program.<sup>103</sup>

#### **B. ECOLABELS AND THIRD-PARTY CERTIFICATION SOLUTIONS FOR SUBSTANTIATING GREEN MARKETING CLAIMS**

Third-party certification and seal of approval programs emerged.<sup>104</sup> In 1991, there were about fifty ecolabels launched that year.<sup>105</sup> In 2011, there were over 350 total ecolabel programs.<sup>106</sup> With ecolabels, “[t]he concept is simple—to reduce an evaluation of a product or process into a simple, environmentally beneficial sign.”<sup>107</sup> Ecolabels are considered “positive” information strategies.<sup>108</sup> Environmental labeling educates the consumer about “the environmental and social impacts of the products and services they buy and use.”<sup>109</sup> This empowers the consumer to make a conscious decision about her environmental preference.<sup>110</sup> Additionally, manufacturers want to capitalize on the market advantage for incorporating environmental considerations into their products.<sup>111</sup>

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101. *Id.*

102. THE GREEN REPORT, *supra* note 78, at 26 (stating that government or industry should enforce clear standards that would “provide consumers with more information about the environmental consequences of their purchasing decisions”).

103. *Id.* at 26–27.

104. SPETH, *supra* note 22, at 150–51; CORPORATE SUSTAINABILITY INITIATIVE, DUKE UNIVERSITY, AN OVERVIEW OF ECOLABELS AND SUSTAINABILITY CERTIFICATIONS IN THE GLOBAL MARKETPLACE 8 (Jay S. Golden ed., 2010), available at <http://center.sustainability.duke.edu/sites/default/files/documents/ecolabelsreport.pdf>.

105. Anastasia O’Rourke, *Trends in Ecolabeling*, CSRHUB, 4 (May 3, 2011) (webinar), [http://www.csrhub.com/files/Sustainable\\_Industries\\_Webinar\\_2011.pdf](http://www.csrhub.com/files/Sustainable_Industries_Webinar_2011.pdf).

106. *Id.*

107. Stewart, *New Generation*, *supra* note 2, at 136.

108. *Id.* at 134. “Information strategies can take many forms in source, type, amount, complexity and audience. They can be negative, such as tobacco warning labels on cigarettes; neutral, as in required reporting under the National Environmental Policy Act (NEPA); or positive, such as eco-labels that disclose the behavioral environmental characteristics of products.” *Id.*

109. CTR. FOR INT’L ENVTL. LAW, ECO-LABELING STANDARDS, GREEN PROCUREMENT AND THE WTO: SIGNIFICANCE FOR WORLD BANK BORROWERS 1 (2005) [hereinafter ECO-LABELING STANDARDS], available at [http://www.ciel.org/Publications/Ecolabeling\\_WTO\\_Mar05.pdf](http://www.ciel.org/Publications/Ecolabeling_WTO_Mar05.pdf).

110. *See id.* at iii.

111. CORPORATE SUSTAINABILITY INITIATIVE, *supra* note 104, at 10.

A single-attribute claim focuses on one environmental aspect whereas a multi-attribute claim evaluates several types of environmental indicators.<sup>112</sup> Whether the label indicates an environmental process or an environmental product has been “a focal point in environmental policy debates.”<sup>113</sup> A process label evaluates how the product was made, whereas a product label indicates “observable or testable characteristics of the final product itself.”<sup>114</sup> Information labels, which have been more effective than simple seal of approval logos, allow the consumer to compare environmental characteristics across products.<sup>115</sup>

Governments and agencies have implemented their own combination of regulations, third-party certifications, and seal of approval programs.<sup>116</sup> Moreover, state and local governments are using ecolabels to indicate compliance with program requirements.<sup>117</sup> Government regulation of certification and seal of approval programs ranges from requiring labels on certain products that inform the consumer about a specified environmental quality, to regulating the right of a product to indicate a certain attribute, to general advisement of voluntary programs administered by third parties.<sup>118</sup> The FTC continues to offer general guidelines for ecolabel programs.<sup>119</sup> The FTC’s proposed *Green Guides* adds a new section called “Certifications and Seals of Approval,” but clarifies that claims by third-party programs are technically already covered under the “Endorsement Guides” section.<sup>120</sup> Significantly, the proposed changes to the guides “cautions marketers that unqualified seals of approval and certifications likely constitute general environmental benefit claims and, because marketers are unlikely to be able to substantiate such claims, they should not use unqualified certifications or seals of approval.”<sup>121</sup>

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112. Stephanie Vierra, *Green Building Standards and Certification Systems*, WHOLE BLDG. DESIGN GUIDE, <http://www.wbdg.org/resources/gbs.php#ar> (last updated Sept. 26, 2011) (referencing ISO 14000 Type I and Type II categories).

113. Michelle T. Friedland, *You Call that Organic?—The USDA’s Misleading Food Regulations*, 13 N.Y.U. ENVTL. L.J. 379, 385 (2005).

114. *Id.* at 384.

115. DIV. FOR SUSTAINABLE DEV., UNITED NATIONS DEP’T OF ECON. & SOC. AFFAIRS, SUSTAINABLE CONSUMPTION AND PRODUCTION: PROMOTING CLIMATE-FRIENDLY HOUSEHOLD CONSUMPTION PATTERNS ¶ 42 (2007) [hereinafter SUSTAINABLE CONSUMPTION AND PRODUCTION], available at <http://www.greeningtheblue.org/sites/default/files/Sustainable%20consumption%20&%20Production.pdf>.

116. Some agencies, like the Department of Agriculture, have created a national definition of “organic” food, then established procedures for third-party certification of the process and labels for marking the food. NATIONAL ORGANIC PROGRAM BACKGROUND INFORMATION, *supra* note 5.

117. See Erin Elizabeth Burg Hupp, *Refining Green Building Regulations and Funding Green Buildings in Order to Achieve Greenhouse Gas Reductions*, 42 URB. LAW. 639, 641–42 (2010).

118. See ECO-LABELING STANDARDS, *supra* note 109, at 4–5.

119. FTC Guides for the Use of Environmental Marketing Claims, 75 Fed. Reg. 63,552 (proposed Oct. 15, 2010) (to be codified at 16 C.F.R. pt. 260).

120. *Id.* at 63,564–68.

121. *Id.* at 63,566.

### III. EVALUATION OF THREE WIDELY RECOGNIZED ECOLABELS IN THE UNITED STATES BASED ON GOVERNMENT INTERVENTION AND CONSUMER COMPREHENSION OF WHAT THE ECOLABEL ACTUALLY REPRESENTS ABOUT THE PRODUCT

Ecolabels have been criticized for their proliferation in the United States—there are too many organizations and too many methodologies used in creating ecolabel criteria<sup>122</sup> because each third-party organization tends to focus on the environmental attributes and impacts relevant to their own industry.<sup>123</sup> Ecolabel programs “face issues of brand awareness, understanding and consumer trust,”<sup>124</sup> and risk further exacerbating consumer confusion.<sup>125</sup> “Because such programs generally involve an overall stamp of approval rather than a description of the specific environmental attributes of a product, they are necessarily based on complicated value judgments about what is best for the environment.”<sup>126</sup> In doing so, the organization is making its own assumptions about the parameters a consumer needs, wants, and understands in order to evaluate an environmental claim.<sup>127</sup>

Ecolabel programs also vary by the program administration, ranging from nonprofit organizations to government agencies.<sup>128</sup> Government organizations only operate 15 percent of the total ecolabel programs.<sup>129</sup> Some critics of ecolabel programs suggest that the consumer confusion with ecolabel programs will be mitigated by uniformity in standards<sup>130</sup> or by more government intervention at the federal level.<sup>131</sup> One author states that “[c]learly defined national standards that have the effect of law are necessary to combat the problems associated with green marketing.”<sup>132</sup> Another author suggests that uniform national standards that preempt state and local governments will solve consumer confusion over green marketing claims.<sup>133</sup> Yet, federally administered ecolabel programs still have issues of

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122. See Gesser, *supra* note 14, at 511–15; TERRACHoice GROUP, *supra* note 98, at 19–20.

123. Gesser, *supra* note 14, at 514–15.

124. Stewart, *New Generation*, *supra* note 2, at 141. “Negative information strategies, which tend to be government mandated, are among the most effective. Neutral information strategies such as environmental impact assessments are used to confront broad, cross medium environmental concerns.” *Id.*

125. THE GREEN REPORT, *supra* note 78, at 26–27.

126. *Id.* at 27.

127. See Grodsky, *supra* note 4, at 225–26 (stressing the importance of whether the parameters are effective indicators of environmental quality).

128. Gesser, *supra* note 14, at 505.

129. O’Rourke, *supra* note 105, at 7.

130. See, e.g., Northen, *supra* note 13. “Universal definitions and standards in the green marketplace” will hopefully mitigate greenwashing of organic food. *Id.* at 130.

131. See, e.g., Menell, *supra* note 11, at 1462–63; Fliegelman, *supra* note 13; White, *supra* note 13, at 325–26 (describing federal regulation options to protect consumers from greenwashing).

132. Avallone, *supra* note 13, at 686.

133. White, *supra* note 13, at 348.

brand awareness and consumer communication that private organizations face.<sup>134</sup> Moreover, federalized ecolabel programs suffer from similar disadvantages of traditional command and control standards.<sup>135</sup>

This note will describe the level of government administration, the consumer miscomprehension associated with the ecolabel, and the disadvantages the program shares with command and control regulations for three ecolabel programs. The ecolabel programs evaluated are environmental labels awarded to products that meet criteria so that they earn a license to use the program seal or label.<sup>136</sup> They also represent a range of sustainable product categories.<sup>137</sup> USDA Organic, ENERGY STAR, and LEED Certified are industry-leading ecolabel programs that consumers recognize.<sup>138</sup>

#### **A. USDA ORGANIC: A FOOD LABEL CREATED AND ADMINISTERED BY THE U.S. DEPARTMENT OF AGRICULTURE**

The USDA Organic label identifies a food or agricultural product that has been produced in compliance with “cultural, biological, and mechanical practices that foster cycling of resources, promote ecological balance, and

134. See, e.g., OFFICE OF AIR AND RADIATION, CLIMATE PROT. DIV., EPA, NATIONAL AWARENESS OF ENERGY STAR FOR 2009: ANALYSIS OF 2009 CEE HOUSEHOLD SURVEY 7–8 (2010), available at [http://www.cee1.org/eval/2009\\_ES\\_survey.pdf](http://www.cee1.org/eval/2009_ES_survey.pdf); Jason J. Czarnetzki, *The Future of Food Eco-Labeling: Organic, Carbon Footprint, and Environmental Life-Cycle Analysis*, 30 STAN. ENVTL. L. J. 3, 34 (2011) (noting that consumers “may identify ‘organic’ with . . . characteristics . . . often not true of many organic foods”).

135. Sean Rosner, *Energy Star Criteria Now Tougher*, MOTHER EARTH NEWS, Aug.–Sept. 2010, at 22. See also U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-470, ENERGY STAR PROGRAM: COVERT TESTING SHOWS THE ENERGY STAR PROGRAM CERTIFICATION PROCESS IS VULNERABLE TO FRAUD AND ABUSE 1–3 (2010).

136. Gesser, *supra* note 14, at 503–04.

137. The sample of product categories includes food and agriculture, electrical products, and buildings (LEED). Product categories are taken from Inhabitat website. Lea Bogdan, *ECO LABELS 101: Green Certifications Explained!*, INHABITAT (Apr. 6, 2010, 2:00 PM), <http://inhabitat.com/demystifying-eco-labels/print>.

138. In 2008, the green building industry accounted for about 33 percent to 42 percent of dollars spent in the building market and is expected to be 62 percent to 75 percent in 2013. GREENGUARD ENVTL. INST., PRIMARY GREEN PRODUCT STANDARDS AND CERTIFICATION PROGRAMS: A COMPARISON 1 (2009) (citations omitted), available at [http://www.greenguard.org/Libraries/GG\\_Documents/Reformat\\_WP\\_GreenProdCertProgCompare\\_FINAL\\_1.sflb.ashx](http://www.greenguard.org/Libraries/GG_Documents/Reformat_WP_GreenProdCertProgCompare_FINAL_1.sflb.ashx). LEED is used throughout the country and is one of “the most commonly used and respected green building rating and certification systems in the marketplace.” Vierra, *supra* note 112, at 3–4. ENERGY STAR (Energy Star) is one of the “primary market movers” of green building product labels. GREENGUARD ENVTL. INST., *supra*, at 1–2 (citing a McGraw-Hill Construction 2009 SmartMarkets report). In 2008, awareness of Energy Star programs among the building industry was 83 percent, while Green Seal was 19 percent, FSC was 21 percent, and WaterSense was 14 percent. GREENGUARD ENVTL. INST., *supra*, at 2. Within the general environmental product category, a 2009 EcoMarkets purchasing survey stated that Energy Star and USDA Organic were two of the ten most recognized eco-label names in the United States. TERRACHoice ENVTL. MKTG., ECOMARKETS SUMMARY REPORT 23 (Sept. 2009), available at <http://www.terrachoice.com/files/EcoMarkets%202009%20Summary%20Report%20-%20Oct%202009.pdf>.

conserve biodiversity.”<sup>139</sup> Any agricultural product labeled as USDA Organic must comply with the specific USDA organic regulations,<sup>140</sup> which focus on chemical-free food products and animal welfare.<sup>141</sup> An agricultural product is “any agricultural commodity or product . . . that is marketed in the United States for human or livestock consumption,”<sup>142</sup> and generally categorized as either crops or livestock.<sup>143</sup>

The organic label is a positive information strategy<sup>144</sup> and is process-driven, meaning it focuses on the inputs of agricultural productions.<sup>145</sup> The USDA Organic ecolabel program does not guarantee that the product is free from pesticides or chemicals,<sup>146</sup> nor does it certify the overall agricultural land use process.<sup>147</sup> Notably, the label does not represent nutritional or food-safety benefits.<sup>148</sup> Among banned practices are the uses of “[s]ynthetic fertilizers, sewage sludge, irradiation, and genetic engineering;”<sup>149</sup> these production methods were widely opposed during the promulgation of the rules.<sup>150</sup>

Organic livestock labeling requires additional procedures.<sup>151</sup> For example, the production standards prohibit using growth hormones.<sup>152</sup> In addition, animal welfare standards specify that the producer implement a procedure that “accommodates the health and natural behavior of animals.”<sup>153</sup>

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139. *National Organic Program*, AGRIC. MKTG. SERV., USDA, <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateC&navID=NationalOrganicProgram&leftNav=NationalOrganicProgram&page=NOPConsumers&description=Consumers&acct=nopgeninfo> (last modified Aug. 7, 2012).

140. *Organic Standards*, AGRIC. MKTG. SERV., USDA, <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateN&navID=OrganicStandardsLinkNOPOrganicStandards&rightNav1=OrganicStandardsLinkNOPOrganicStandards&topNav=&leftNav=&page=NOPOrganicStandards&resultType=&acct=nopgeninfo> (last modified Aug. 14, 2012).

141. Czarnecki, *supra* note 134, at 15.

142. National Organic Program, 7 C.F.R. § 205.2 (2010).

143. *See id.* (defining “crop” and “livestock”). Livestock includes “cattle, sheep, goats, swine, poultry, . . . equine animals . . . [and] game,” but excludes aquatic animals and bees. *Id.* *See also Organic Standards*, *supra* note 140.

144. Margot J. Pollans, Note, *Bundling Public and Private Goods: The Market for Sustainable Organics*, 85 N.Y.U. L. REV. 621, 634 (2010) (citations omitted).

145. Mikael Klinton, *Ambiguous Framings of Political Consumerism: Means or End, Product or Process Orientation?*, 30 INT’L J. CONSUMER STUD. 427, 432 (2006); Pollans, *supra* note 144, at 641.

146. Friedland, *supra* note 113, at 384–85. The National Organic Program (NOP) is supposed to require organic certifying agents to conduct periodic testing for pesticide residue. OFFICE OF INSPECTOR GEN., *supra* note 6, at 2–3.

147. Czarnecki, *supra* note 134, at 15.

148. NATIONAL ORGANIC PROGRAM BACKGROUND INFORMATION, *supra* note 5.

149. *National Organic Program*, *supra* note 139.

150. Conner & Christy, *supra* note 9. The NOP initially tried to qualify “genetically modified organisms (GMOs), biosolids, and irradiation” as permitted organic methods of production, but ultimately banned them in the promulgated rule. *Id.*

151. *See generally* National Organic Program, 7 C.F.R. §§ 205.236–205.239 (2010).

152. *Id.* § 205.237(b)(1).

153. *Id.* § 205.239(a).



In its infancy, “organic agriculture began . . . on a very small scale” with a “dedicated group of semi-idealist[]” farmers.<sup>154</sup> Then Congress passed the Organic Foods Production Act of 1990, which required the USDA to promulgate uniform standards for foods labeled as “organic.”<sup>155</sup> The USDA’s Agricultural Marketing Services created the National Organic Program (NOP) to administer the program, from developing standards to establishing the organic certification program.<sup>156</sup> The NOP regulations address organic production, identification, certification, and accreditation standards for agricultural products.<sup>157</sup>

After the federal government intervened, organic food labeling transformed “from a more complex and diverse system to a nationally standardized” labeling program.<sup>158</sup> As of 2008, organic products accounted for “over 3 percent of total U.S. food sales.”<sup>159</sup> In 2008, produce comprised 37 percent of total organic sales, with dairy the next top seller at 16 percent, while organic meat, fish, and poultry accounted for only 3 percent of organic sales.<sup>160</sup> The organic label has been criticized for assuming that a food labeling system for organic foods is a simple process, “as if organic foods were something absolute,” and that developing uniform national standards will enable green consumerism to flourish.<sup>161</sup>

### 1. Consumer Comprehension and Misconception

Consumers misunderstand the label’s meaning and function.<sup>162</sup> Many believe the organic label means that the product is free from residual amounts of banned products that unintentionally contaminated the product, that buying organic products supports small farms, that organic farms are local farms, or that organic livestock promotes animal welfare.<sup>163</sup> Consumers of organic products justify their willingness to pay for the

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154. Klintman, *supra* note 145, at 431.

155. NATIONAL ORGANIC PROGRAM BACKGROUND INFORMATION, *supra* note 5.

156. *Id.*

157. *Id.* (explaining crop standards and livestock standards, grouped separately).

158. Klintman, *supra* note 145, at 431.

159. *Organic Agriculture: Organic Market Overview*, ECON. RESEARCH SERV., USDA, <http://www.ers.usda.gov/topics/natural-resources-environment/organic-agriculture/organic-market-overview.aspx> (last updated June 19, 2012) (citations omitted).

160. *Id.* “Produce accounted for 37 percent of U.S. organic food sales in 2008, followed by dairy (16 percent), beverages (13 percent), packaged and prepared foods (13 percent), bread and grains (10 percent), snack foods (5 percent), meat, fish, and poultry (3 percent), and condiments (3 percent).” *Id.*

161. Klintman, *supra* note 145, at 427–28.

162. Conner & Christy, *supra* note 9.

163. Kate L. Harrison, Comment, *Organic Plus: Regulating Beyond the Current Organic Standards*, 25 PACE ENVTL. L. REV. 211, 221–27 (2008). See also *id.* at 233 (recommending an “Organic Plus” label for products “tested GMO and pesticide residue free,” “produced without the use of mined additives,” “produced on a small family farm,” “locally produced,” and “pasture raised”).

organic products with reasons of “support for sustainable agriculture and local food systems, and opposition to the ‘corporate’ food system.”<sup>164</sup>

Organic farming and sustainable farming are not necessarily equivalent practices.<sup>165</sup> A sustainable ecolabel would likely indicate the food’s carbon footprint, waste, natural resource impact from water consumption and land use, and health attributes.<sup>166</sup> Organic farming may cause environmental tradeoffs because the energy savings from nonuse of chemicals is often offset by an energy increase in cultivating and harvesting, as organic crop yields per acre tend to be less than conventional farming practices.<sup>167</sup> Likewise, organic farming is not reserved for noncorporate small businesses.<sup>168</sup> Some of the largest food company brand names, like Coca-Cola, Dole, General Mills, H.J. Heinz, Kellogg, Mars, Kraft, Sara Lee, and Tyson Foods, have directly or indirectly acquired organic food lines.<sup>169</sup>

Consumer confusion also arises over the level of animal welfare that the organic label indicates. Livestock must have access to outdoor space year-round, but this standard has been interpreted as only requiring an “opportunity to exit” and does not “mandate that an entire herd or flock have access to the outdoors at any one time.”<sup>170</sup> In addition, the regulations distinguish between grazing (ruminant) animals and non-grazing (poultry) animals.<sup>171</sup> Ruminant livestock must be allowed to graze for sustenance on pastures for at least 1/3 of the year.<sup>172</sup> Organic poultry seems to withstand the worst of this distinction’s burden, because some certifiers have abused the temporary confinement loophole to confine birds.<sup>173</sup>

## 2. Similar Problems Between the Ecolabel and Certification Program and Technology-Based Standards

The biggest problem with the USDA Organic label is its inconsistent enforcement and monitoring mechanisms.<sup>174</sup> The USDA Agricultural

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164. Conner & Christy, *supra* note 9, at 42.

165. Pollans, *supra* note 144, at 640–41; *see also* Czarnecki, *supra* note 134, at 31.

166. Czarnecki, *supra* note 134, at 31 (advocating for a new ecolabel that evaluates the food product comprehensively for its lifecycle and for multiple attributes).

167. SUSTAINABLE CONSUMPTION AND PRODUCTION, *supra* note 115, at 23.

168. Friedland, *supra* note 113, at 409.

169. *Id.* “As of 2003, five extremely large farms controlled half of California’s \$400 million organic produce market.” *Id.*

170. NAT’L ORGANIC PROGRAM, USDA, POLICY MEMO 11-5, ACCESS TO THE OUTDOORS FOR LIVESTOCK (2011), *available at* <http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5088950>.

171. National Organic Program, 7 C.F.R. § 205.239 (2010).

172. *Id.* §§ 205.237, 205.239(a).

173. *See* Sheila Rodriguez, *The Morally Informed Consumer: Examining Animal Welfare Claims on Egg Labels*, 30 TEMP J. SCI. TECH. & ENVTL. L. 51, 73 (2011).

174. *E.g.*, OFFICE OF INSPECTOR GEN., *supra* note 6; Gabriel Nelson, *USDA’s Organic Enforcement Let Offenders Slide, Audit Says*, N.Y. TIMES (Mar. 19, 2010), <http://www.nytimes.com/gwire/2010/03/19/greenwire-usdas-organic-enforcers-let-offenders-slide-au-12233.html?pagewanted=print>.

Marketing Service administers the NOP ecolabel program.<sup>175</sup> The NOP is supposed “to assure consumers that organic products meet uniform standards and that they are appropriately labeled.”<sup>176</sup> This is a daunting task for a program that had a staff of sixteen and a budget of about four million dollars in 2009.<sup>177</sup> NOP’s resources are insufficient to monitor 30,000 certified farms and facilities and 100 accredited certifiers.<sup>178</sup> Between 2006 and 2008, the USDA notified the NOP about five products in violation of the USDA Organic label criteria;<sup>179</sup> it took the NOP an average of fifteen months to respond to each violation.<sup>180</sup>

In 2010, the USDA Office of Inspector General (OIG) published the findings of its NOP audit.<sup>181</sup> It found that despite the Organic Food Production Act of 1990 requiring certified agents to “conduct periodic residue testing of organic products,” the NOP regulations purposely omitted such obligations because of costs and “complex issues.”<sup>182</sup> The OIG audited four USDA-accredited certifying agents responsible for certifying over 5,000 farms and found that not a single farm was tested periodically for residue.<sup>183</sup> Additionally, due to budget and logistic constraints, the NOP failed to follow its own requirements for evaluating its internal performance in every year except for its inception year.<sup>184</sup>

#### **B. ENERGY STAR: AN APPLIANCE LABEL CREATED AND ADMINISTERED BY THE U.S. ENVIRONMENTAL PROTECTION AGENCY AND DEPARTMENT OF ENERGY**

The EPA and Department of Energy (DOE) share joint responsibility in administering the ENERGY STAR (Energy Star) ecolabel program.<sup>185</sup> The purpose of the Energy Star label program is to reduce air pollution resulting

175. *National Organic Program Background Information*, *supra* note 5.

176. OFFICE OF INSPECTOR GEN., *supra* note 6, at 1.

177. *See id.* at 39 (noting that the NOP hoped to increase both its staff size and budget); Nelson, *supra* note 174.

178. *Organic Certification & Accreditation, National Organic Program*, AGRIC. MKTG. SERV., USDA,

<http://www.ams.usda.gov/AMSv1.0/ams.fetchTemplateData.do?template=TemplateN&navID=NationalOrganicProgram&leftNav=NationalOrganicProgram&page=NOPAccreditationandCertification&description=Accreditation%20and%20Certification&acct=nopgeninfo> (last modified Apr. 17, 2012).

179. Nelson, *supra* note 174.

180. *Id.*

181. OFFICE OF INSPECTOR GEN., *supra* note 6, at 32. This audit was conducted between 2008 and 2009. *Id.*

182. *Id.* at 2–3 (internal citations omitted).

183. *Id.* at 2, 7.

184. *Id.* at 18. In 2004, the American National Standards Institute reviewed the NOP and found that it “lacked documented policies and procedures for managing the accreditation of certifying agents.” *Id.*

185. Geoffrey M. White et al., *Green Building Rating Systems and Green Leases*, in *THE LAW OF GREEN BUILDINGS* 15, 27 (J. Cullen Howe & Michael B. Gerrard eds., 2010).

from inefficient energy consumption and to help consumers identify the products that are superior in energy efficiency performance.<sup>186</sup> Home appliances and products identified as Energy Star products have complied with energy efficiency and energy savings criteria.<sup>187</sup>

The Energy Star program generally promotes a single environmental characteristic—energy efficiency—and does not indicate overall positive environmental performance.<sup>188</sup> Within the Appliance category, the EPA sets ecolabel criteria for dehumidifiers and room air cleaners.<sup>189</sup> The DOE regulates clothes washers, dishwashers, refrigerators and freezers, and room air conditioners; furthermore, these product categories must comply with additional federal standards.<sup>190</sup> The Energy Star ecolabel was intended to identify the top 25 percent most efficient products within a particular category; thus, it is most useful when there is a variance in energy usage among product models.<sup>191</sup> Once too many models meet the requirements, the agency will need to revise the specifications again so that it perpetually stays ahead of the market.<sup>192</sup>

Congress created the Energy Star program as part of the Clean Air Act, federal legislation that strives to reduce air pollution.<sup>193</sup> Additionally, section 131 of the Energy Policy Act mandates that the EPA and DOE promote Energy Star labeled products in the marketplace.<sup>194</sup> These federal laws basically preempt states from setting more stringent appliance standards than the Energy Star program requires.<sup>195</sup>

With the enactment of the Energy Policy Act of 2005, federal agencies must purchase certain energy efficient equipment, of which Energy Star

186. ENERGY STAR, *supra* note 5, at 2.

187. White et al., *supra* note 185.

188. Stewart, *New Generation*, *supra* note 2, at 137.

189. EPA, MAINTAINING THE VALUE OF ENERGY STAR 10 (2007).

190. *Id.* at 10–11 tbl.1. For example, an Energy Star labeled refrigerator should exceed federal minimum energy efficiency requirements by 20 percent or more. *Promoting Energy Star Qualified Refrigerators*, ENERGY STAR, [https://www.energystar.gov/ia/partners/manuf\\_res/salestraining\\_res/Refrigerator\\_Sell\\_Sheet.pdf](https://www.energystar.gov/ia/partners/manuf_res/salestraining_res/Refrigerator_Sell_Sheet.pdf) (last updated Sept. 2010).

191. ENERGY STAR, *supra* note 5, at 10 (“If all product models used approximately equal amounts of energy, then an ENERGY STAR specification would not be pragmatic . . .”).

192. *See id.* at 11.

Once an ENERGY STAR specification is in place for some amount of time, market conditions and the available model mix may change, resulting in a majority of models meeting the specification. Thus, the label would no longer serve as a differentiator. This scenario dictates that EPA and DOE reassess the specification and potentially revise it, so that the label again serves to identify the most efficient models.

*Id.*

193. *See* EPA, *supra* note 189, at 6.

194. *Id.*

195. Alexandra B. Klass, *State Standards for Nationwide Products Revisited: Federalism, Green Building Codes, and Appliance Efficiency Standards*, 34 HARV. ENVTL. L. REV. 335, 346 (2010).

labeled products qualify.<sup>196</sup> Because manufacturers are strongly incentivized to cater to such a significant market sector, the federal public procurement guidelines infiltrate the private market as well.<sup>197</sup> There are over 40,000 products that have earned the Energy Star label in over 60 different categories.<sup>198</sup> In 2009, Americans purchased about 300,000,000 Energy Star products.<sup>199</sup>

### 1. Consumer Comprehension and Misconception

Energy Star ecolabels should help consumers determine which appliances save energy and money over the product lifetime as compared to other models.<sup>200</sup> A 2009 survey found that most of the polled consumers who were aware of the Energy Star label felt that by purchasing such labeled products they were “helping to protect the environment for future generations” and “contributing to society.”<sup>201</sup> Sixty percent of the polled consumers thought the label conveyed “energy efficiency or energy savings” and 17 percent thought the label conveyed “environmental benefits.”<sup>202</sup> The EPA said that these responses showed “high understanding of the label.”<sup>203</sup>

Of the consumers who recognized the Energy Star label, 25 percent associated it with clothes dryers, 11 percent with stoves and ovens, and 4 percent with microwave ovens, despite that these appliances are incapable of receiving the Energy Star label—no specifications exist.<sup>204</sup> As previously mentioned, an ecolabel may confuse the consumer by representing itself as a good option overall, rather than a “less bad” option.<sup>205</sup> A comparable analogy with ecolabels is that an energy-intensive appliance may receive an Energy Star label for being more efficient than comparable products, though a nonelectrical alternative is not considered.<sup>206</sup>

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196. *E.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 135, at 6–10; *Product Purchasing and Computer Power Management for Federal Agencies*, ENERGY STAR, [http://www.energystar.gov/index.cfm?c=fed\\_agencies.fed\\_ag\\_index](http://www.energystar.gov/index.cfm?c=fed_agencies.fed_ag_index) (last accessed Sept. 22, 2012).

197. SUSTAINABLE CONSUMPTION AND PRODUCTION, *supra* note 115, at 12–13.

198. OFFICE OF AIR AND RADIATION, EPA, EPA 430-R-11-002, ENERGY STAR AND OTHER CLIMATE PROTECTION PARTNERSHIPS 4 (2010).

199. *Id.*

200. Matthew L. Wald & Leslie Kaufman, *U.S. Tightens Requirements for Energy Star Certification*, N.Y. TIMES, Apr. 14, 2010, at B4.

201. OFFICE OF AIR AND RADIATION, *supra* note 134, at C-7.

202. *Id.* at 14.

203. *Id.*

204. *Id.* at 7–8.

205. An American Heart Association initiative labeled foods that were less bad than comparable foods regarding heart disease. Grodsky, *supra* note 4, at 210 (citations omitted).

206. *See id.* at 211. A vacuum cleaner might be labeled as more energy efficient than other vacuum cleaners, but a typical broom that uses even less energy “could fall outside the categories of products tested.” *Id.*

Because so many products receive the Energy Star label, the program has been criticized for “diluting its impact.”<sup>207</sup> In 2010, Consumer Reports stated that 75 percent “of TVs, dishwashers and humidifiers qualified for Energy Star designation in 2009” even though the program aimed to identify the top 25 percent performing appliances.<sup>208</sup> They urged the government program to award products that are truly the top one-third energy efficiency performers in their sector.<sup>209</sup> Additionally, Consumer Reports believes that the government should be more vigilant and “review Energy Star qualification criteria and tests about every three years.”<sup>210</sup>

## 2. How the Ecolabel and Certification Program Suffers from Similar Problems of Technology-Based Standards

Because of the numerous products and categories, the Energy Star ecolabel program has been a uniform national standard that is incredibly difficult to enforce.<sup>211</sup> The enormity of rulemaking procedures, costs, and review periods impedes the government’s ability to promulgate revised standards in a reasonable time.<sup>212</sup> This leads to energy efficiency standards that are “extremely out-of-date;”<sup>213</sup> meanwhile, the appliance manufacturers have little incentive to exceed the Energy Star ecolabel certification requirements on their own initiative.<sup>214</sup>

A 2010 Consumer Reports study highlighted the disparity in what Energy Star standards require compared to actual product performance.<sup>215</sup> More notably, the U.S. Government Accountability Office (GAO) conducted an independent investigation and found that the Energy Star label was used on “radically inefficient products” and that the certification requirements were “easily manipulated.”<sup>216</sup> The GAO found that the DOE basically trusted the manufacturers to certify their own products and relied on the vendors to enforce compliance with energy efficiency standards.<sup>217</sup>

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207. Taylor Knight, *New Label Takes Energy Star One Step Further*, USA TODAY, Aug. 31, 2011, (Money), at 3b.

208. *Id.*

209. *Viewpoint. Energy Star Improves*, CONSUMER REP., July 9, 2010, at 6.

210. *Id.*

211. *E.g.*, U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 135, at 1–3, 15.

212. Klass, *supra* note 195, at 349–50.

213. *Id.* at 349.

214. *Id.*

215. Alan Wolf, *Feds Testing Appliances for Energy Star Compliance*, TWICE: THIS WEEK CONSUMER ELECTRONICS, Apr. 25, 2010, at 35.

216. Rosner, *supra* note 135. *See also* U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 135, at 7–8 (describing the fictitious products that the GAO submitted that received the Energy Star label).

217. “Our proactive testing revealed that the Energy Star program is primarily a self-certification program relying on corporate honesty and industry self-policing to protect the integrity of the Energy Star label.” U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 135, at 8; *see* Wolf, *supra* note 215.

The EPA and DOE realized that they needed to “regain consumer trust in the Energy Star label.”<sup>218</sup> To help encourage innovation, they created a new “Energy Star Most Efficient program,” which recognizes the best Energy Star ecolabel products.<sup>219</sup> And to increase credibility in the certification process, manufacturers pursuing either Energy Star label must now have their product certified by an EPA-approved facility.<sup>220</sup>

**C. LEADERSHIP IN ENERGY & ENVIRONMENTAL DESIGN (LEED): A BUILDINGS LABEL CREATED AND ADMINISTERED BY THE NONPROFIT ORGANIZATION U.S. GREEN BUILDING COUNCIL**

The U.S. Green Building Council (USGBC) administers the most prolific green building rating system in the country.<sup>221</sup> Buildings that receive LEED certification meet criteria that take a “whole-building approach to sustainability.”<sup>222</sup> Only LEED Certified buildings have the right to use the LEED Certification Mark to advertise the building’s environmental attributes.<sup>223</sup> Their four levels of certification—Platinum, Gold, Silver, and Certified—each have a unique ecolabel.<sup>224</sup> To earn a level of certification, buildings earn points in categories: sustainable sites, water efficiency, energy and atmosphere, materials and resources, indoor environmental quality, innovation in design, and regional considerations.<sup>225</sup>

The USGBC is a nonprofit organization comprised of industry leaders who develop, revise, and administer the LEED green building certification program.<sup>226</sup> However, federal, state, and local governments have begun to encroach on this voluntarily-sought ecolabel program.<sup>227</sup> Certain federal

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218. Rosner, *supra* note 135.

219. Knight, *supra* note 207.

220. *Id.*

ENERGY STAR partners had historically been able to test their products in any laboratory of their choice, and submit product data directly to EPA for review pursuant to qualification. Under the new requirements, which became effective January 1, 2011, partners are required to have their products certified by an EPA-recognized Certification Body (CB) of their choice.

*Third-Party Certification*, ENERGY STAR, <http://energystar.supportportal.com/link/portal/23002/23018/Article/31965/How-do-ENERGY-STAR-partners-qualify-products-under-the-third-party-certification-requirements> (last visited Aug. 23, 2012).

221. Geoffrey M. White et al., *supra* note 185, at 25; *see About USGBC*, U.S. GREEN BLDG. COUNCIL, <https://www.usgbc.org/ShowFile.aspx?DocumentID=18692> (last updated July 27, 2012).

222. *What LEED Measures*, U.S. GREEN BLDG. COUNCIL, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1989> (last visited Aug. 23, 2012).

223. *USGBC Trademark Policy*, U.S. GREEN BLDG. COUNCIL, 15 (2011), <http://www.usgbc.org/ShowFile.aspx?DocumentID=3885> (last updated May 13, 2011).

224. *Id.*

225. *See What LEED Measures*, *supra* note 222.

226. *About USGBC*, *supra* note 221.

227. Les Lo Baugh, *LEED Green Building Incentives*, PLI Order No. 16007 PRACTISING L. INST. 23, 25–29 (2008); TASK GROUP ON BLDG. RATING AND CERTIFICATION, NAT’L INST. OF

agencies now require their public buildings to obtain LEED certification,<sup>228</sup> and state and local governments incentivize private buildings to do so.<sup>229</sup> Cities also are beginning to incorporate LEED green building rating system criteria by reference in their local building codes.<sup>230</sup> The USGBC estimates that “442 localities[,] . . . 35 state governments . . . , [and] 14 federal agencies or departments” have implemented LEED-referencing government initiatives.<sup>231</sup>

Because building codes are typically adopted and enforced by state and local governments, the federal government has minimal regulatory infrastructure to enforce its own national green building program.<sup>232</sup> Some critics, nonetheless, call for “[a] comprehensive green building code addressing the multi-faceted environmental impacts of buildings.”<sup>233</sup> Others advocate for the importance of maintaining individual local programs because of the inherent issue in adopting a voluntary ecolabel and certification program as a national standard.<sup>234</sup> Governments and agencies rapidly adopt voluntary building certification programs as building standards “without fully understanding their benefits, tradeoffs, and costs.”<sup>235</sup> The building community is uncomfortable with such voluntary programs being transformed into required programs.<sup>236</sup>

### 1. Consumer Comprehension and Misconception

The stakeholders in the building industry have “significant misperceptions and misguided expectations” of what the ecolabel certification programs represent.<sup>237</sup> Some of the confusion may be because LEED certification is process-based, rather than product-based.<sup>238</sup> Even though LEED Certified buildings are designed to exceed energy efficiency performance of a typical building, their actual performance may not be any

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BLDG. SCIS., REPORT ON BUILDING RATING AND CERTIFICATION IN THE U.S. BUILDING COMMUNITY 7 (2009), available at [http://www.nibs.org/client/assets/files/nibs/NIBS\\_RatingCertificationTaskGroupReport.pdf](http://www.nibs.org/client/assets/files/nibs/NIBS_RatingCertificationTaskGroupReport.pdf).

228. Baugh, *supra* note 227, at 35–38.

229. *Id.* at 28–29.

230. Hupp, *supra* note 117, at 644.

231. LEED INITIATIVES BY STATE, *supra* note 5.

232. See Shari Shapiro, *Who Should Regulate? Federalism and Conflict in Regulation of Green Buildings*, 34 WM. & MARY ENVTL. L. & POL’Y REV. 257, 276 (2009).

233. *Id.* at 279.

234. Sarah B. Schindler, *Following Industry’s LEED®: Municipal Adoption of Private Green Building Standards*, 62 FLA. L. REV. 285, 300 (2010). “[O]rdinances that force private developers to comply with uniform standards developed by a private building-industry organization are fraught with practical and legal problems.” *Id.* at 290.

235. TASK GROUP ON BLDG. RATING AND CERTIFICATION, *supra* note 227.

236. *Id.*

237. *Id.*

238. The certification process begins before occupants even enter the building. See Sara C. Bronin, *The Quiet Revolution Revived: Sustainable Design, Land Use Regulation, and the States*, 93 MINN. L. REV. 231, 242 (2009).



more energy efficient than a nonrated building.<sup>239</sup> Additionally, owners are able to pick and choose which points to earn, usually by striving for the easiest points to obtain.<sup>240</sup> Thus, energy performance and indoor air quality during the building occupancy could be inconsistent among LEED Certified buildings with the same level of points.

## **2. How the Ecolabel and Certification Program Suffers from Similar Problems of Technology-Based Standards**

The LEED green building rating system program strikes an appropriate balance between standards and innovation. Nonetheless, its technology-based component is criticized for stifling innovation and for inadequate administrative capabilities to oversee a national program.<sup>241</sup> With the LEED green building rating system, all of the measures are assigned the same value, regardless of costs or associated benefits.<sup>242</sup> The USGBC is also known for long delays in certification and backups in applications.<sup>243</sup> Granted, the LEED green building rating system is revised constantly to ensure it remains an innovative ecolabel and certification program.<sup>244</sup> Yet, the constant change is also a downfall to its effectiveness, as industries must constantly meet a moving target.<sup>245</sup>

## **IV. RECOMMENDATIONS FOR OPTIMAL GOVERNMENT INTERVENTION TO PRESERVE ECOLABEL AWARENESS**

Ecolabel programs combine the expedience and enforceability of technology-based standards<sup>246</sup> with industry innovation and public participation.<sup>247</sup> Ecolabels raise consumer awareness about environmental products, substantiate marketing claims, and encourage innovation by stimulating a market for new technology.<sup>248</sup> Although ecolabels are not without their flaws, federalizing one type of environmental standard that addresses all possible product impacts is unlikely to be feasible.<sup>249</sup> Many ecolabel programs are inherently unsuitable for federal uniform

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239. White et al., *supra* note 185, at 20, 23–24; see Mireya Navarro, *Some Buildings Not Living up to Green Label*, N.Y. TIMES, Aug. 31, 2009, at A8.

240. Bronin, *supra* note 238; Schindler, *supra* note 234, at 327–28.

241. See Ackerman & Stewart, *supra* note 1, at 1334–40.

242. White et al., *supra* note 185, at 23.

243. *Id.*

244. *About LEED*, U.S. GREEN BLDG. COUNCIL, <https://www.usgbc.org/ShowFile.aspx?DocumentID=18694> (last updated July 27, 2012). “The hallmark of LEED and its ability to affect market transformation is its continuous improvement cycle that enables the rating system to increase in scope and stringency as market readiness increases and new technologies become widely available.” *Id.*

245. See Stewart, *Conceptual Framework*, *supra* note 1, at 1272.

246. See Wagner, *supra* note 1, at 94.

247. See Grodsky, *supra* note 4, at 207.

248. Gesser, *supra* note 14, at 511–12.

249. *Id.* at 514–15; see Latin, *supra* note 28, at 1279.

standards.<sup>250</sup> Additionally, this note argues that governmentally administered ecolabel programs suffer from both consumer miscomprehension and command and control consequences. Thus, environmental advocates and industries alike should be weary of obliterating a hybrid regulatory approach with federalized command and control regulations.

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250. Schindler, *supra* note 234, at 290, 300.

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